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E. ROBERT SEAVER, CL

Nos. 70-85 and 70-94

In the Supreme Court of the United States

OCTOBER TERM, 1971

PAUL M. BRANZBURG, PETITIONER

v.

JOHN P. HAYES, JUDGE, AND HENRY MEIGS, JUDGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

IN THE MATTER OF PAUL PAPPAS, PETITIONER

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THE INTEREST OF THE UNITED STATES

In *United States* v. *Caldwell*, No. 70–57, the United States brought before this Court the narrow question whether, assuming that a newspaper reporter is privileged to withhold information from a grand jury which he obtained confidentially in the process of newsgathering, the privilege would extend so far as to bar a grand jury, in the absence of a preliminary showing of particularized need, from calling the

reporter to testify about matters not received in confidence, when the reporter, in published articles, has set forth information of obvious interest to the grand jury. It is our position there that, whatever may be the nature and scope of the newsman's privilege, it does not render a reporter immune from the necessity of at least appearing before a grand jury in response to a subpoena *ad testificandum* which has been limited by court order to matters that are of a non-confidential nature.

These cases present broader questions. In *Pappas*, where petitioner was allowed to visit the headquarters of the Black Panthers on the promise that he would not disclose what he heard or saw unless there was a police raid, the question presented is whether, in the absence of a statute, a reporter has a privilege to withhold from a grand jury investigating criminal acts information as to what he saw and heard during his visit. In *Branzburg*, where the reporter described and photographed the commission of a crime—the production of hashish—the constitutional question[1] is

[1] In the proceedings below, petitioner Branzburg also relied upon a Kentucky statute (Ky. Rev. Stat. 421.100 (1969)), which extends to newsmen a privilege of non-disclosure as to the source of any published information.

The statute provides: "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

whether a reporter has a First Amendment privilege to withhold from a grand jury facts ascertained from his personal observation of the crime.

Whether a reporter's privilege is implicit in the First Amendment guarantee of a free press, and, if so, the scope of such privilege, are matters which concern the United States as well as the states. While, as a matter of policy, the Attorney General has issued guidelines designed to minimize friction between the prosecution and the news media,[2] it is important for the Executive and the Congress to know the extent of their responsibilities under the Constitution in this field. It is our basic position that the question whether there should be a reporter's privilege, and the extent of such privilege, is for Congress rather than for the courts, and that it is to the legislature, rather than to this Court, that the news media should address their arguments.

SUMMARY OF ARGUMENT

The claim of privilege by reporters and journalists is not new. It has been advanced repeatedly in the courts, in Congress, in state legislatures and before various rulemaking committees. It has been analogized to the traditional privileges at common law, proposed as a rule of evidence, and urged as a constitutional right implicit in the First Amendment guarantee of a free press. With minor exception—most notably in the area of state legislation—the efforts have been to no avail.

[2] The Attorney General's Guidelines are set forth in an appendix to our brief on the merits in *United States* v. *Caldwell*, No. 70–57, this Term, at pp. 49–51.

The news media have functioned effectively and efficiently in this country for almost two hundred years without a reporter's privilege. Since the early days of the Republic, the newsgathering process has depended in large part on information given to reporters in confidence. Despite the fact that anonymous informants have always been faced with the possibility that some day before some grand jury investigating criminal activity the reporter might be called upon to divulge his sources, the flow of confidential information to the media has increased significantly over the years.

Obviously, the vast majority of such information is unrelated to the fact that news reporters may be called upon to tell what they know about criminal acts. The area of potential clash between law enforcement agencies and the claimed reporter's privilege is a narrow one, confined largely to situations where newsmen have witnessed or may have witnessed events bearing on the commission of a crime. Recognition of a privilege in this area raises far-reaching questions of policy which cannot be adequately answered by such broad phrases as "the right to gather news." The reporters are claiming, not merely the right to gather news, but the right to withhold news on the basis of promises that they, in their sole discretion, make to their informants. This is not so clearly desirable nor so clearly necessary to effective news reporting that the Court should recognize the position of the news media as a matter of constitutional right.

The Attorney General and most states have recognized that this is a delicate area and that it is desirable to interfere as little as possible with the newsgather-

ing activities of the news media. This, however, is different from according to the news media a privilege under the Constitution to be free of the duty imposed on all citizens to give testimony relating to a crime. The past two hundred years demonstrate convincingly that such a privilege is not essential to a meaningful exercise of the protected freedoms of the press to write, to publish, and to circulate the news. Whether or not it is desirable is a different question altogether. But, the desirability of according a privilege to news reporters and the scope of such a privilege are matters that should be left to the legislative process; it is, therefore, to the legislature, rather than to this Court, that the news media should address their arguments.

ARGUMENT

WHETHER OR NOT THE PROTECTION OF A NEWSMAN'S CONFIDENTIAL ASSOCIATIONS IS DESIRABLE AS A MATTER OF POLICY, THERE IS NO REPORTER'S PRIVILEGE AS A MATTER OF FIRST AMENDMENT RIGHT

1. The question before the Court in these cases is not, as the briefs of the petitioners and of the news media seem to assume, whether it is desirable for news reporters to have the privilege of withholding from grand juries and law enforcement authorities information which the reporters believe was received in confidence, even if such information relates to the commission of a crime. The issue presented here is a very different one: whether recognition of such a privilege is so essential to the existence of a free press that newsmen must be deemed to have that privilege as of right under the First Amendment. Unless that

is so, questions relating to a claimed reporter's privilege are not issues for the courts, but for the legislative process.

Despite the efforts of respected news reporters, in the affidavits carefully prepared for the *Caldwell* case, to suggest that failure to recognize their claimed privilege as implicit in the First Amendment will result in the demise of a free press, the fact remains that the newsgathering process has functioned effectively and efficiently in this country for almost two hundred years without benefit of the special protections sought in these cases. It has, of course, long been recognized that many newsworthy stories would never have reached the public if the sources had been unable to rely on anonymity. Almost forty years ago, this point was made as forcefully as it is today (Siebert and Ryniker, *Editor and Publisher*, September 1, 1934, pp. 36–37):

> News channels which prove valuable in unearthing such examples of public scandals remain so only as long as the source remains secret. Honest officials, and occasionally dishonest persons, who can furnish necessary information cannot afford to jeopardize their freedom or their jobs by permitting their names to be used. * * * No information would be given if the informant did not have faith in the integrity of the reporter in the matter of withholding his name. The newspaper man would find his channels of news closed.

But, notwithstanding the Ninth Circuit's recent decision in *Caldwell*, the possibility that some day before some grand jury investigating criminal activ-

ity the reporter might be called upon to divulge his source of information—a possibility that has existed since the early days of the Republic—has apparently not in the past deterred the anonymous informant from communicating with the news media. As revealed by a 1968 study of all major newspapers in the United States, an "absolutely staggering" number of news stories are developed from information given to reporters in confidence. Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 43–44, 60 (1969).

2. Obviously, news reporters obtain all sorts of confidential information, from personal gossip to opinions on affairs of state, which will not be affected by the fact that they may be called upon to tell what they know about criminal acts. The area of potential clash between law enforcement agencies and the claimed reporter's privilege is, therefore, a narrow one. It is largely confined, as the cases presently before this Court illustrate, to situations where reporters have witnessed or may have witnessed events which have a bearing on the commission of a crime. Recognition of a privilege in this area raises far-reaching questions of policy, which cannot be adequately answered by the broad generalizations offered by the media.

For example, is a press really free when it deliberately sets out to publicize a crime but refuses to disclose the criminal, as in the Kentucky case? Misprision of a felony is a crime of long standing. See generally 1 Stat. 112, 113; 15A C.J.S. §§ 2(2)–3. Without undertaking to decide whether a reporter who witnesses the crime is guilty of an affirmative act of

misprision by refusing to disclose identities, it is clear that his act is violative of the basic principle sustaining that offense—that the state is entitled to the testimony of all men with knowledge of facts disclosing crime. Cf. *Brown* v. *Walker*, 161 U.S. 591, 600. In the area of relationships with minority and dissident groups, there are also some basic questions which must be considered. Is a press really free when, as in the Massachusetts case, the minority group has it in its power to decide what the public will or will not be told by the conditions it imposes on permitting a reporter access to its headquarters? Is it more important that the press maintain a thread of relationships to such groups by acceding to their conditions, reasonable or unreasonable, or is it more important that the press report what they can manage to find out, untrammeled by the conditions imposed by their informants?

We raise the questions, not to answer them, but to suggest that the question whether there should be a reporter's privilege, and what its scope should be, is not a simple issue capable of resolution by such broad phrases as "the right to gather news." The reporters are claiming, not merely the right to gather news, but the right to withhold news on the basis of promises that they, in their sole discretion, make to their informants.[3] This, we submit, is not so clearly desirable nor so clearly necessary to effective news reporting

[3] Petitioners and the news media liken the reporter's privilege to the privilege of the government informer. See *Roviaro* v. *United States*, 353 U.S. 53, 59; *McCray* v. *Illinois*, 386 U.S. 300. As this Court stated in *Roviaro* (353 U.S. at 59), however, the informer's privilege "recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity,

that the Court should recognize the position of the news media as a matter of constitutional right.

The only privilege reognized by the Constitution is the privilege against self-incrimination (Fifth Amendment). Whether other privileges should exist is a matter to be decided by regular legislative means on the basis of the normal debate and full consideration of competing values that regularly enter into legislation. Some states have enacted statutes governing the newsman's privilege, only a few of them as broad as the privilege claimed in these cases.[4] If the present-day circumstances justify recognition of a privilege of broader scope and of nation-wide coverage, that determination ought to be made by Congress. That body is better suited to the task of developing the scope and

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encourages them to perform that obligation." By contrast, the claimed reporter's privilege is designed to permit newsmen to withhold from law-enforcement officials their knowledge of criminal activity, and thus has precisely the opposite effect from the privilege accorded to government informers.

[4] Such legislation has been passed in seventeen states: Ala. Code Recompiled Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (1967, 1970 Cum. Supp.); Ariz. Rev. Stat. Ann. § 12-2237 (1969 Supp.); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code Ann. § 1070 (West 1966); Ind. Ann. Stat. § 2-1733 (1968); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. § 45:1451-54 (1970 Cum. Supp.); Md. Ann. Code Art. 35, § 2 (1971); Mich. Stat. Ann. § 28.945(1) (1954); Mont. Rev. Codes Ann. Tit. 93), ch. 601-2 (1964); Nev. Rev. Stat. § 48.087 (1969); N.J. Stat. Ann. Tit. 2A, ch. 84A, § 21, 29 (Supp. 1969); N.M. Stat. Ann. § 20-1-12.1 (1953, 1967 Rev.); N.Y. Civ. Rights Law § 79-h (McKinney 1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. Tit. 28, § 330 (1958, 1970 Cum. Supp.). For a discussion of the differences in the scope of coverage under these statutes, see Comment. *Constitutional Protection for the Newsman's Work Product*, 6 Harv. Civ. R.-Civ. Lib. L. Rev. 119, 121-122 (1970).

limitations of such a privilege in a systematic way than are the courts as a function of interpreting the Constitution.

3. At the time that the Founding Fathers drafted the Bill of Rights, the common law recognized no privilege on the part of a news reporter to conceal his source of information or to withhold information received by him in confidence. 8 Wigmore, *Evidence* § 2286 (McNaughton Rev. 1961). Prior to the decision of the Ninth Circuit in *Caldwell*, courts in this country which have been called upon to recognize such a privilege have, with minor exception,[5] consistently refused to do so. See, *e.g.*, *Garland* v. *Torre*, 259 F. 2d 545 (C.A. 2), certiorari denied, 358 U.S. 910; *Rosenberg* v. *Carroll*, 99 F. Supp. 629 (S.D.N.Y.); *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass.); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P. 2d 472; *People ex rel. Mooney* v. *Sheriff of* New York County, 269 N.Y. 291, 199 N.E. 415.[6] Quite apart from any question as to the aptness of the analogy of the claimed reporter's privilege to the traditional privileges existing for certain personal relationships (*i.e.*, attorney-client, husband-wife, etc.),[7]

[5] See, *e.g.*, *In re Nat Caldwell* (unreported opinion of Tennessee Criminal Court), New York Law Revision Commission, Report, 85–86 (1949); *Aliota* v. *Cowles Communications, Inc.*, N.D. Calif., C.A. 52150, decided December 4, 1969; *People* v. *Dohrn*, Cook County Cir. Ct., Crim. No. 69–3808, decided May 20, 1970.

[6] For a collection of cases dealing with the refusal of a newsman to disclose, see Annot. 7 A.L.R. 3d 591 (1966). See also New York Law Revision Commission, Report, *supra*, at 59–96.

[7] For a discussion concluding that such analogies are imperfect, see Note, *The Newsman's Privilege: Protection of Confidential Associations and Private Communications*, 4 J.L. Reform

the fundamental rationale underlying these decisions seems to be a disinclination to limit the duty imposed upon all to attend and give their testimony in a court of law by expanding the class of persons entitled to withhold evidence on the basis of some privilege.[8] See, *Garland* v. *Torre, supra,* 259 F. 2d at 550; *In re Goodfader's Appeal, supra,* 45 Hawaii at 333–335, 367 P. 2d at 482–483. As then Judge Stewart stated in *Garland* v. *Torre, supra,* 259 F. 2d at 550:

> The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned. It has been emphasized that the tendency should be "not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege." * * * To recognize the privilege asserted here, assuming our power to do so, would poorly serve the cause of justice.

It is only recently that the First Amendment has been offered as a basis for the refusal by newsmen to testify. The decisions in this area appear to go three

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85, 89–93 (1970). Compare Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18, 26–27 (1969). And see n. 3, *supra*.

[8] Disinclination to expand privileges of non-disclosure, even those previously recognized, has been voiced by various commentators. See, *e.g.*, 8 Wigmore, *Evidence* § 2192 at 73, § 2286 at 536 (McNaughton Rev. 1961); Morgan, Foreword, Model Code of Evidence, 22–30 (1942); 2 Chafee, *Government and Mass Communications*, 495–499 (1947); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Vir. L. Rev. 61, 83 (1950).

ways. There are cases which totally reject the claim that the First Amendment prohibits compelling a reporter to disclose a confidential source or information received in confidence. See, *e.g.*, *In re Taylor*, 412 Pa. 32, 193 A. 2d 181; *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, certiorari denied, 392 U.S. 905. Second, there are a group of cases which assume, without so deciding, that disclosure in some circumstances might constitute an infringement of First Amendment rights, but find no First Amendment violation because the interest in disclosure, in the circumstances presented, outweighs any possible impingement on freedom of the press. *Garland* v. *Torre*, 259 F. 2d 545 (C.A. 2), certiorari denied, 858 U.S. 910; see also *State* v. *Knops*, 49 Wis. 2d 647, 183 N.W. 2d 93.[9] Only a few very recent decisions actually decide that compulsory disclosure invariably trenches on the First Amendment freedom of the press and require that a special showing be made to justify disclosure. See *United States* v. *Caldwell*, 434 F. 2d 1081 (C.A. 9), pending on certiorari, No. 70–57, this Term; and see cases cited at n. 5, *supra*. There thus is certainly no general recognition of an overriding need for the claimed reporter's privilege in order for the media to continue providing the public—as they have for almost two centuries—with "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press* v. *United States*, 326 U.S. 1, 20).

[9] The *Knops* decision is reprinted in our Supplemental Memorandum to the petition for certiorari in *United States* v. *Caldwell*, No. 70–57, this Term, certiorari granted, May 3, 1971.

4. That the absence of a privilege has not rendered the press ineffective in gathering news is evidenced by its inability yet to convince Congress or a number of state legislatures that the reporter's privilege is essential to a free press in a free society.[10] Although bills creating such a privilege have been proposed on several occasions, none has ever emerged from committee.[11] There is presently pending before the Judiciary Committee another bill which provides protection of the newsman's confidential sources and communications. See S. 1311, 92d Cong., 1st Sess. (1970). In addition, the Committee on Rules of Evidence is in the process of formulating evidentiary rules for

[10] Indeed, on several occasions Congress has, even in the face of an apparent claim of privilege, cited newsmen for contempt for refusing to answer questions before a congressional investigating committee. Thus, in 1857, the House of Representatives appointed a committee to investigate published charges to the effect that members of the House were accepting bribes. A newspaper correspondent, J. W. Simonton, appeared before the committee and refused to disclose names of members whom he claimed had approached him, inquiring whether, through him, they could procure money for their votes on certain bills. His refusal was based on the ground that a disclosure would violate a confidence. See Cong. Globe, 34th Cong., 3d Sess. 274–275, 277, 404, 411–413 (1857). For a complete report of the proceedings in this matter, see S. Misc. Doc. No. 278, 53d Cong., 2d Sess. 85–190 (1894). For a similar case in the Senate, see *id.* at 311–504 (1894).

[11] See, *e.g.*, S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, 88th Cong., 1st Sess. (1963); H.R. 7787, 88th Cong., 1st Sess. (1963). See New York Law Revision Commission, Report, *supra*, at 88–95 (1949), for a listing of bills introduced in the 71st, 72d, 74th, 75th, 76th and 78th Sessions of Congress.

the federal courts.[12] It is in such a forum, or in Congress, that the value judgments relating to recognition of a newsman's privilege should be debated and resolved.

The Attorney General and a number of states have recognized that this is a delicate area, and that it is desirable to interfere as little as possible with the news-gathering activities of the media (see nn. 2, 4, *supra*). This, however, is different from according to the news media a privilege under the Constitution to be free of the duty imposed on all citizens to give testimony relating to a crime. The past two hundred years illustrate convincingly that such a privilege is not necessary to a meaningful exercise of the protected freedoms of the press to write,[13] to publish[14] and to circulate[15] the news. As Justice Holmes said, speaking of a related type of constitutional problem, in *Otis Co.* v. *Ludlow Manufacturing Co.*, 201 U.S. 140, 154:

> We are bound to be very cautious in coming to the conclusion that the Fourteenth Amendment

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[12] As of now the Proposed Rules of Evidence for the United States District Courts and Magistrates (46 F.R.D. 161) not only do not provide a newsman's privilege but sharply limit the number of personal-relationship privileges—even excluding a general physician-patient privilege. 46 F.R.D. 161, 249–269 (Rules 5–03 to 5–06).

[13] See, *e.g.*, *New York Times* v. *Sullivan*, 376 U.S. 254; *Time, Inc.* v. *Hill*, 385 U.S. 374; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81.

[14] See, *e.g.*, *New York Times Company* v. *United States* and *United States* v. *The Washington Post Company*, Nos. 1873 and 1885, October Term, 1970 decided June 30, 1971.

[15] See, *e.g.*, *Winters* v. *United States*, 333 U.S. 507, 510; *Lovell* v. *Griffin*, 303 U.S. 444; *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Near* v. *Minnesota*, 283 U.S. 697.

has upset what thus has been established and accepted for a long time.

Whether or not such a privilege is desirable is, as stated at the outset, a different question altogether. The desirability of according a privilege to news reporters and the scope of such a privilege are matters, we submit, that should be left to the legislative process.

CONCLUSION

For the reasons stated, the judgments of the Court of Appeals for the Commonwealth of Kentucky in No. 70–85 and the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in No. 70–94 should be affirmed.

Respectfully submitted.

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